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THE NATURE OF GOVERNMENTAL FUNCTIONS.

THE reform of judicial procedure has ceased to be a question merely for the discussion of various bar associations and has become a matter of general interest, being deemed of sufficient importance to be made the subject of planks in various party platforms. The law's delay, its technicalities, its form and fictions, all these have been the subjects of so many speeches, articles, and resolutions that the general impression seems to be that the passage of a few statutes formulating codes of simple procedure will prevent the recurrence of cases where technical rules have seemed to prevent the administration of common sense justice.

While reforms in procedure and pleadings are undoubtedly necessary, it would seem that the public has not gone deep enough into the real evil, but is seeking to destroy an effect without eliminating the cause. If the substantive law were direct, simple and easily comprehended a system of rules of procedure technical and intricate in nature could not have arisen.

The rights and obligations of the government—State, federal, and municipal—should certainly be clearly defined and easily understood, yet the general field of municipal law is one wherein practically every doctrine is shrouded in doubt and confusion.

The government which most directly affects the private citizen is that of the municipality where he resides, yet even the skilled lawyer cannot formulate a rule which explains upon reasonable principles why the city is at one time a private corporation and at another a governmental agency, when the city is acting throughout for the benefit of its citizens as citizens also

of the State, and has no authority to act at all unless the action taken is for the public benefit.

A reform of substantive law governing municipal corporations in the direction either of total liability as a corporation or absolute exemption as a government seems clearly to be demanded, and the inertia of the people upon the questions of this nature can be explained only upon the theory that Americans are, as has been charged, "Careful students of politics and absolutely careless as to government." The present rules of law as to municipal liability are based upon constitutions of fifty years ago or even further back, and many of them have their origin in customs and laws which never prevailed in this country and are, indeed, foreign to the fundamental ideas of our public policy.

When the question of the liability of a municipal corporation for the negligent acts of commission or omission of its agents is discussed, the rule which is to govern can be recited even by the tyro:

A city is not liable for acts done in its governmental capacity or as an agent of the State but is liable for all wrongs committed in its private or corporate character.

This is a rule which would be most easy of application were it possible to determine how a corporation which is created solely to discharge public functions, and which acts *ultra vires* when it exceeds the grants given to it for the public benefit, can act as a private or corporate body. And if this were determinable upon logical rules the question would still remain how are we to determine what is a public and what is a private function.

The many inconsistencies into which the courts have been led in an attempt to follow this rule—much less to explain it—appear clearly from an examination of the decisions.

A citizen is standing upon the street corner when, attracted by the clanging fire bells, he walks to the curb stone to watch the fire department dash by. A crowd is gathered—as one always does—to watch the spectacle. The horses become frightened and dash into the crowd and this citizen is seriously hurt. His injury is *damnum absque injuria* because the city in main-

taining a fire department is carrying on a governmental function and is not liable for any acts committed in the discharge of such function.

But in order to see what has happened, another citizen comes running up the street and catches his foot on a dislodged paving stone or in a hole in the sidewalk, spraining his ankle. This citizen can recover damages because the maintenance of a street for the fire department to run on is a private and corporate act of the municipality.

Both of these doctrines are well sustained by the authorities.[1]

Equally strong are the holdings to the effect that the city is liable for the condition of its streets, and injuries resulting therefrom.[2]

However, the citizen might feel that he had acquired a working rule to the effect that cities were liable for the condition and character of the streets in all cases but were not liable for anything connected with the fire department. A few days later someone is injured because the fire department, in turning out to go to a fire swings open the doors of the engine house quickly in order to permit the engines to come out. Clearly this is an instance of an injury by the fire department and no recovery should be allowed. But the citizen discovers that on the authority of Kies *v.* Erie [3] he is entitled to a complete recovery.

The impression then is created that the city is liable for everything that happens on the streets, but a policeman in shooting at a dog, which is venturing abroad without a muzzle aims badly and hits a passerby. Here the citizen has no recovery on account of the holding of Whitefield *v.* Paris,[4] and yet another citizen who is passing by a fire engine house and runs into a

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[1] See for example as to the non-liability of a city for its fire department; Irvine *v.* Chattanooga, 101 Tenn. 291, 47 S. W. 419; Howard *v.* San Francisco, 51 Cal. 52; Jewett *v.* New Haven, 38 Conn. 368; Torbush *v.* Norwich, 38 Conn. 225; Simon *v.* Atlanta, 67 Ga. 618; Wilcox *v.* Chicago, 107 Ill. 334; Burrill *v.* Augusta, 78 Maine 118, 3 Atl. 177.

[2] Fleming *v.* City of Memphis, 126 Tenn. 331, 148 S. W. 1057; Burns *v.* Bradford, 137 Pa. St. 361; Malloy *v.* Walker Township, 77 Mich. 448, 43 N. W. 1012; Gibson *v.* Huntington, 38 W. Va. 177, 18 S. E. 447, 22 L. R. A. 561; Cleveland *v.* King, 132 U. S. 295.

[3] 169 Pa. St. 598, 32 Atl. 621. [4] 84 Texas 431.

ladder projecting over the sidewalk can recover under the authority of Kies *v.* Erie [5] but is barred under the holding of Dodge *v.* Granger.[6]

Nor is the city liable when it is chopping down weeds in an alley and a child is attracted there and injured through the negligence of the person doing the work.[7]

This is a little disturbing to the citizen seeking for some rule which will govern his rights, as the streets seem sometimes to be matters for which the city is responsible and at other times affairs in which it has no interest. It is explained, however, that the city is exercising its police power and thereafter a citizen is carefully on the lookout for all men in either the uniform of the fire or police department.

But the city is threatened with smallpox and an ordinance is passed for the compulsory vaccination of all citizens. Impure vaccine matter is administered and illness results, but there can be no recovery as has been expressly held in Wyatt *v.* Rome.[8] Nor is the administrator of another citizen allowed to recover because his intestate was improperly removed to an over crowded smallpox hospital and died from the consequent exposure.[9]

These decisions are based upon the ground that the municipality has full power to conserve and protect the public health and in so doing is acting in a governmental capacity.

Now if there is one thing accepted in the present time as the hygienic doctrine it is that cleanliness is not only next to godliness but the open door to health. Mr. Citizen's town has a poor water supply and he is desirous of improving the local condition and therefore goes to see the city government and suggests that they install a water plant in place of the private company, doing business in the city, and thus promote the health of the citizens. He urges in support of this plea that the city would be under no liability for the damages inflicted by the water department and could therefore afford to sell water at very greatly reduced rates. Imagine his amazement when he is

[5] *Supra.*
[6] 17 R. I. 644, 24 Atl. 100.
[7] McFadden *v.* Jewell, 119 Iowa 321, 93 N. W. 302.
[8] 105 Ga. 312, 31 S. E. 188.
[9] Tyman *v.* Frankfort, 117 Ky. 518, 78 S. W. 446.

told that the cases here cited,[10] and indeed practically all the authorities hold that the city is liable for accidents which happen in connection with its water works system.

Surprised by this new knowledge the citizen is careless upon his way home and walks so near the edge of the sidewalk that a sprinkling cart, operated by a careless driver, throws water over his new suit of clothes and completely ruins it. Thinking he has an action a lawyer is consulted, but the citizen finds[11] that the city is not liable because sprinkling the streets promotes the health of the public and is a governmental function. Thus it would seem to be the rule that water taken homeopathically is not an injury but the furnishing of it in large quantities may be the basis of an action. But one of the neighbor's boys goes to the public baths provided by the city on the river front, and is unfortunately drowned. The courts deny any recovery for this accident upon the theory that furnishing baths is a governmental function and has been so held in McGraw *v.* District of Columbia.[12]

These cases sufficiently illustrate the absolute inconsistencies into which an apparently clear definition of rights has led the courts. Nor does the reasoning of the decisions furnish any clear rules by which one class of cases can be distinguished from the other and the city be held liable in the one instance and blameless in the other.

The distinction as to the liabilities of cities for private acts as opposed to public ones arose originally in England where corporations were created by Royal Charters which could not be either imposed upon the city or altered without the consent of the corporators except indeed by Parliament. Such charters carried to the cities special immunities, privileges and rights which were not enjoyed by the vast body of other citizens, and it was held that by virtue of such charters there was an implied

[10] Esberg-Gunst Cigar Co. *v.* Portland, 34 Ore. 282, 155 Pac. 961; Rhobidas *v.* Concord, 79 N. H. 90; Piper *v.* City of Madison, 140 Wis. 311, 122 N. W. 730, 25 L. R. A. (N. S.) 239; State ex rel. Hallauer *v.* Gosnel (Wis.), 61 L. R. A. 33.

[11] Connelly *v.* Nashville, 100 Tenn. 262, 46 S. W. 565.

[12] 3 App. D. C. 405, 25 L. R. A. 691.

contract that the city should be liable for certain injuries inflicted by its agents.

This rule cannot apply in America where municipal corporations are mere creatures of the State legislature, with such powers and limitations as the legislature sees fit to impose, being subject to abolition even at the legislative whim.[13] *Cessat ratio cessat ipsa lex.*

Mr. Dillon in his work on Municipal Corporations [14] characterizes any idea of implied contract as a theory "purely ideal." He thinks, however, that a distinction can be made on the basis of the particular nature of the duty enjoined, the city being liable where the duty is imperative and not discretionary or judicial and relates to the local or special interests of the municipality. He also bases liability upon the fact that the means given for the performance of the duty are in such cases ample or so considered by the legislature.

Now it is difficult to see how the sprinkling of the streets [15] and the vaccination and quarantining of citizens relate to the general welfare of the public when the furnishing of water is a special and private benefit. Are we to base this distinction upon the ground that the public health is subserved in the one case and not in the other? The fact is that a large faction even among the medical profession disapproves of vaccination, while it is the universal rule that a proper supply of clean water is absolutely essential to a sanitary municipality.

Nor can a distinction between public and private functions be based upon the theory that the city derives revenue from the operation of the water plant, and secures none from street sprinkling. The city secures no revenue from its streets, which are maintained solely for the public benefit and at the public expense, yet it is generally held that a city is liable for the poor condition of its thoroughfares. The courts have, moreover, held that the fact that the water works were constructed under authority imposed by the legislature and managed by a commit-

[13] Barnes *v.* District of Columbia, 91 U. S. 540; Blair *v.* Chicago, 201 U. S. 400; Luehrmann *v.* Taxing District, 2 Lea (Tenn.) 425.

[14] Section 1646.

[15] Connelly *v.* Nashville, *supra.*

tee also appointed by the legislature would not exempt the city from liability [15a] and the question of whether or not the city is really operating its water plant at actual cost is immaterial, as the municipality is liable in any event.[16] It is true that the State does not engage in the business itself of furnishing water, but the State does not sprinkle streets or highways, furnish free vaccination nor in many States maintain any hospitals.

The non-liability of the city for the acts of its police department is well established.[17] This non-liability is based upon the theory that the public safety is being protected by the maintainance of a police force. Now it is a matter well known to students of city affairs that a well-lighted city is one where certain classes of crimes are rare. "A lamp post at a corner is as good as a policeman" is a maxim known to be true by the heads of all police departments. But if a city should endeavor to install a municipal lighting plant for the purpose of lighting its streets, thus promoting the safety of travelers upon the thoroughfare by diminishing violence and increasing the safety of the way, the city would be liable for any accidents resulting from the failure to properly operate the plant.[18]

The absolute necessity of sewers for sanitation has been recognized even to the extent of holding a city not liable for injuries in the construction of a sewer system [19] but allowing a sewer to become obstructed and thus causing damage has been expressly held to create liability.[20] Here again one is compelled to wonder why a hospital to cure the sick should be a

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[15a] Esberg-Gunst Cigar Co. *v.* City of Portland, *supra.*

[16] Wagoner *v.* Rockland Island, 146 Ill. 139, 21 L. R. A. 519.

[17] Gorman *v.* Chattanooga, 2 Ct. Civ. App. Tenn. 551; Davis *v.* Knoxville, 6 Pick. (Tenn.) 599; Carty *v.* Winooski (Vt.), 62 Atl. 45, 2 L. R. A. (N. S.) 95 and notes; Bell *v.* Cincinnati, 80 Ohio St. 1, 88 N. C. 128, 23 L. R. A. (N. S.) 910.

[18] San Francisco Gas Co. *v.* San Francisco, 9 Cal. 469; Davoust *v.* Alameda (Cal.), 84 Pac. 760, 5 L. R. A. (U. S.) 536; Henderson *v.* Young (Ky.), 83 S. W. 583; Bulmaster *v.* St. Joseph, 70 Mo. App. 60.

[19] Smith *v.* Commissioners of Sewerage, 148 Ky. 562, 143 S. W. 3, 38 L. R. A. (N. S.) 151.

[20] Burton *v.* Chattanooga, 7 Lea (Tenn.) 739; Kolb *v.* Knoxville, 111 Tenn. 311.

governmental power and sewers to prevent sickness a private enterprise.

Mr. Dillon's basis of distinction does not seem to apply to cases such as we have cited, because it will not enable us to draw the line between liability and non-liability.

The truth of the matter is that our States have not settled upon any definite and determined public policy, and the courts have consequently been left to grope blindly in the dark.

The exemption of a government from liability is based upon the theory of sovereignty. The acts of the government were those of the king, and the king could do no wrong. The idea was also that certain things worked for the good of the many and the welfare of the few must be sacrificed in the public interest. If this is to be adopted as a correct rule then there is really nothing for which a municipality should be liable at all. To speak of a government acting in a private capacity is really a confusion of terms. A city has only such power as the legislature gives it and its charter is given for the sole purpose of making more efficient the general government of the State. If the city engages in a business from which it derives a profit, this profit is used solely for the benefit of the citizens in lightening their burdens of government. The whole function of a city is to promote the public health, the public safety and the public welfare—objects of the police power and essentially governmental in their nature.

How a city can be at the one time a government and at the next a corporation, when in both instances it is seeking the same ends, is something which cannot be logically explained. What has happened is that the courts of many States have been inclined to favor the individual and have therefore held as governmental only such functions as the older cities used to exercise, and characterized as private all modern municipal activities.

The courts have not allowed for municipal progress. A city without a water plant at the present time would be as archaic as one without a fire or police department. Streets must be kept clean under modern conditions and the dust laid by proper sprinkling in order to promote health. Yet because cities were

formerly liable for the condition of their streets they are being held today to a like liability and exempted from liability when cleaning the streets to make them sanitary but not from responsibility when lighting them to make them safe.

The courts should adopt a rule, if they incline to the sovereignty idea, that whatever is done for the public health, the public morals, welfare and safety is a sovereign act and nothing done in carrying it out can create any liability upon the city. Whatever conduces to the public weal, judged by modern standards of what is essential, and what is the function of an up-to-date municipality should be permitted to come under the protection of a governmental function. The legislature has no real power to give a city the right to do things except such as are proper to a government, and the declaration of the legislature that a city can do certain things should be a sufficient finding that an act is governmental in nature unless the legislature clearly transcends either (1) its own powers or (2) those which it has the right to delegate.

This would, of course, give municipalities a great deal of power, but the courts already extended the rights of cities to lengths of which the medieval citizens would never have dreamed, as in holdings, for example, that the maintenance of a park was a proper municipal function [21] and that the city was not liable for the condition thereof. If it is true that the sovereign, to wit, the State, is not liable, then its agent should enjoy the same immunity and the municipality should also be exempt. Repeated negligence upon the part of municipal officers could be punished criminally, if it was thought the powers given the city and its exemption from suit would tend to increase negligence.

If it be State policy, on the other hand, that the welfare of the individual should not be subordinated to the public, then there should be a right to recover for every injury which the individual receives. The artificial distinction which would permit a person falling in a hole located on the city line to recover if he stepped in the city's side [22] and deny him a recovery if he

[21] Park Commissioners *v.* Prinz, 127 Ky. 460, 105 S. W. 948.
[22] Fleming *v.* Memphis, *supra.*

stepped in the county's side [23] should be swept away and the rule established that the government is bound to answer the same as any other tortfeasor.

This rule would be attended with a great deal of inconvenience, would increase the expenses of the government and its litigation, but it would be undoubtedly fair to the citizens and consistent.

There can be no defense for a rule which allows a government to be at the one time exempt as a master and at the other time liable as an equal. The courts should adhere to the one rule or the other, and the legislatures through their enactments and the people through their constitutions should determine whether the sovereign is really to be such or the idea of sovereignty is to be abolished. To permit the courts to make laws upon this subject according to the ideas of the temporary occupants of the bench with no system of public policy to guide and the necessity of harmonizing old decisions to hamper free thought is to encourage a continuance of technicalities and forms and hinder the growth of Justice.

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[23] Wood *v.* Tipton County, 7 Baxt. (Tenn.) 101.